yahoo.com. AT&T obviously could not control this vast array of opportunities, or the new advertising opportunities that arise constantly. Further, the infinite creative means of advertising – from pop-up advertisements to scrolling banners – further confirm that there is no "market" for any entity to dominate. Opponents' arguments that AT&T will dominate Internet advertising post-Merger must be rejected.[292]

Internet Portals. Opponents argue that there is a separate market for broadband portals, and that because the Merger would result in customers being foreclosed from access providers other than @Home or Road Runner, investment in the broadband portal market would decrease, harming consumers and other access providers.[293] These arguments have no merit.

First, there is no separate "broadband portal" market. Internet portals share only one definitional element of commonality, in that every Internet portal provides a point of entrance to the World Wide Web. Aside from this feature, Internet portals vary in the nature of their lay-out, the content and links they feature, and the community ties they develop. For example, Internet portals can range from general interest to niche portals and customized Intranet to brand-name portals.[294] Companies host portals featuring a variety of functions and features, such as links to popular sites, guides to the Internet, news, chat rooms, free e-mail, financial data and, in the case of AltaVista, free Net access for subscribers.[295] Because the concept of an "Internet portal"

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[292] *See* Ordover/Willig Decl. ¶ 119.

[293] *See* Bell Atlantic at 43-46.

[294] *See Get into Web Portals* (March 15, 1999) <www.computerworld.com>.

[295] *Alta Vista's Free Access: Bold Move or Hail Mary?* (August 13, 1999) <www.thestandard.net>.

encompasses such a diverse scope of applications, and because these applications will continue to be shaped, modified and expanded to address the perceived needs of consumers, the term defies classification as one distinct market.

In any event, the Merger would not allow AT&T to monopolize any hypothetical market for broadband portals. As discussed above, neither @Home nor Road Runner subscribers are forced to use the @Home and Road Runner portals, but can determine their own first screen. There are already numerous competitors seeking to be a customer's first screen, such as Yahoo!, AOL, Infoseek, Lycos, Alta Vista, and Netscape, each attempting to position itself as the provider of a unique entry to the Web,[296] and there are no entry barriers to such a "market," because anyone with access to the Web can create a "portal" site that aggregates and links to other content. New competitors can commence broadband portal services with relative ease. BET Holdings ("BET") recently entered the competition for Internet portals with a $3.5 million investment in its debut 'affinity' portal,[297] demonstrating that the ability to build market share and attract a profitable level of Web traffic and online advertising, is neither monopolized by AT&T nor limited to those entities generally viewed as dominating the Internet arena (*i.e.*, Yahoo!, AOL, Infoseek, Lycos and Netscape).[298] Thus, even if there were a "market" for

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[296] *See* George Mannes, *Portals Promise Profits, Power*, (June 4, 1999) <www.abcnews.com>. Some of these portals get millions of "visits" per day. *See Get into Web Portals* (March 15, 1999), <www.computerworld.com>.

[297] *BET Aims to Close the Digital Divide*, (Aug. 12 1999) <www.thestandard.net>.

[298] *See* Mannes *supra*.

broadband portals, Merger opponents' arguments that AT&T would monopolize such a market are baseless.[299]

Video Streaming Technology and Services. Opponents' argument that the Merger would allow AT&T to dominate video streaming technology[300] also fails. First, like Internet advertising, video streaming is too diverse an area, with numerous companies each taking a different approach to its use, to stand as a separate "market." Moreover, Opponents cannot make up their minds whether AT&T will try to kill off video streaming (in which case the click is not merger-specific because both @Home and Road Runner already have video streaming limits) or monopolize it. Because there is no prospect that @Home and Road Runner will be immune from competitive pressures for the foreseeable future, Opponents are clearly misguided when they argue that the Merger poses a special problem with respect to limitations on streaming video content.[301] As an initial matter, "streaming" traffic is notorious for causing congestion on the Internet.[302] Limitations on video streaming make perfect sense in light of the bandwidth-hogging characteristics of such traffic. Until bandwidth consumption can be measured and priced to reflect higher usage, a limit on overall traffic helps reduce the "tragedy of the commons" that

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[299] *See* Ordover/Willig Decl. ¶ 120.

[300] *See, e.g.*, SBC at 30; GTE at 35; Bell Atlantic at 46-49.

[301] Bell Atlantic 46-49; GTE 53-54.

[302] Sara Robinson, *Multimedia Transmissions Drive Net Toward Gridlock*, New York Times, (Aug, 23, 1999) <www.nytimes.com/archives/search/fastweb?getdoc+allyears2+db365+382695+0+wAAA+multimedia%7Etransmissions> ("When a computer sending conventional data encounters congestion, it significantly slows its own transmission rate, but a computer sending streaming data will reduce the flow only slightly. So if streaming traffic competes with conventional traffic for the same congested strip of roadway, the streaming traffic, like some VIP motorcade, assumes the right of way and lets all other data traffic pile up.").

would otherwise ensue.[303] In all events, assertions that AT&T has or will obtain through the Merger a subscriber base large enough to stifle the emergence of video streaming software are wrong for the same reasons the claims regarding Internet content and advertising fail. As discussed extensively above, AT&T's interest is in attracting subscribers and unnecessary restrictions on access are fundamentally inconsistent with this goal.

Likewise flawed are contentions that AT&T will be able to dictate the future of video streaming technology in order to monopolize this emerging service.[304] The vigorous competition among companies that produce this technology, and the ease with which new companies can compete, make this impossible. While Opponents argue that the @Home-RealNetworks deal will foreclose rival software sellers,[305] the remaining competitors – including Microsoft's "NetShow" – are too strong to be so easily dismissed. In any event, it is impossible to ascertain at this time which streaming technology will eventually succeed. While RealNetworks allows customers to hear and watch stored and live programs as they are downloaded, NetShow uses an

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[303] Merger opponents who caution that video streaming limitations will undermine the development of alternatives to cable television programming simply do not understand the technical capabilities of the Internet. *E.g.*, Bell Atlantic 9-10; GTE 6, 16; CU/CFA (Cooper Report 77). Because current video streaming technologies are bandwidth-intensive, they undermine the success of the network. *See, e.g.*, Matthew Bruesma, *@Home Network Troubles Continue*, Inter@ctive Week Online, (Aug. 25, 1999) (noting technical challenges involved in maintaining higher-bandwidth speeds). Some observers have suggested that usage restrictions could in fact play an important role in encouraging bandwidth-efficient technologies. Sean Sexton, *Broadband Access Promises Richer Internet Multimedia; At Home's 10-Minute Limit on Video Streaming Stirs Debate*, DM News, (May 17, 1999).

[304] The recent debut of MCI WorldCom's ACS video streaming technology illustrates the ease with which companies can develop new technologies and enter the competition. *See* Chuck Moozakis, *MCI WorldCom Intros Streaming Service*, (September 9, 1999) <http://www.techweb.com/wire/story/TWB1999090950016>.

[305] *See* Bell Atlantic at 46-49.

active streaming format (ASF) to regulate the download of audio and visual files to customers.[306] Apple Computers' QuickTime has adopted its own approach to video streaming. Video streaming is simply too new a technology, developing and changing constantly, to be confined to any one approach or for any one company to emerge as its dominant provider.

IP Telephony. Opponents create a fictitious "market" for "IP telephony," and argue that post-Merger, AT&T would dominate such a market. These arguments are as ironic as they are misguided. They are ironic because Opponents currently monopolize the actual relevant market – the market for local telephone service. IP telephony is simply a small and newly emerging option in this market. Within the market for local telephone service, AT&T is an extremely small competitor.[307] Rather than restricting AT&T's development in this area, the Commission should encourage and promote the development of new telephony technologies that facilitate competition with the RBOCs for the provision of local telephone service.[308]

In any event, Opponents are misguided because the vast number of IP telephony companies and ease with which new companies can enter the IP telephony field similarly dispel arguments that AT&T will dominate IP telephony post-Merger, even if such considerations were relevant.[309] AT&T faces strong competition in the provision of IP telephony services from

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[306] *See Industry Streams Ahead*, (August 22, 1997) <www.news.com/SpecialFeatures/0,5,13610,00.html>. *Stream Team Works for Multicasting*, (August 5, 1997) <http//www.news.com/News/Item/0,4,13137,00.html>.

[307] *See, e.g., Ushering in a New Era for the Local Services Market*, InternetWeek (February 15, 1999) <http://www.techweb.com/se/directlink/cgi?INW19990215550051>.

[308] *See* Ordover/Willig Decl. ¶ 116.

[309] *See, e.g.*, Bell Atlantic at 49-51.

traditional carriers such as MCI WorldCom and Sprint, as well as from the RBOCs; new IP telephony companies, such as IDT Corp., USATalks, Net2Phone and USA Global Link; ISPs, such as PSINet; and IP-based service providers, such as Level 3 Communications and Qwest Communications International, which have invested billions of dollars in new high-speed IP backbones to offer IP-based services.[310] Each of these carriers has adopted a different strategy and business plan, and plans to offer a different array of services, and each is a competitor to AT&T to which consumers may turn.[311]

Internet Software and Equipment. Opponents argue that the Merger will allow AT&T to establish preferred relationships with particular broadband software and equipment manufacturers, and use those relationships to dictate the standards used in broadband software and equipment, to the exclusion of other, unaffiliated manufacturers.[312] They further argue that AT&T will establish network and software protocols that will prevent applications that run on AT&T's system from operating on competitors' systems.[313] These arguments rely on Opponents' previous arguments that the Merger will allow AT&T to control its customers' access to the Internet, which, as discussed above, are baseless. Because AT&T customers will be able, post-Merger, to subscribe to any Internet access service they choose, and unaffiliated services may use any software or equipment of their own selection, AT&T will not be able to

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[310] *See Voice Over IP: The Battle Heats Up*, (March 8, 1999) <www.techweb.com/se/directlink.cgi?NWC19990308S0015>.

[311] Opponents' argument that AT&T will force its customers to use its IP telephony service is nonsensical. AT&T would have no power to direct its customers in this way.

[312] *See, e.g.*, Bell Atlantic at 52-54; GTE at 38.

[313] *See, e.g.*, GTE at 38-40.

promote any particular manufacturer or standard, regardless of which manufacturer or software is selected for use in the @Home or Road Runner services. Further, it would be nonsensical for AT&T to frustrate its own customers' choices by rendering outside access services inoperable on AT&T's system. Customers dissatisfied with AT&T would be most likely to switch to the more established method of broadband access – by subscribing to AOL or a similar access service – than to switch to AT&T's own service.

Internet Backbone Services. Finally, Merger opponents argue that the Merger will have anti-competitive effects in the market for Internet "backbone" services. AT&T, @Home, and Road Runner provide Internet backbone services, which the Commission has previously found to be a defined "market."[314] However, the Merger would not create or enhance the likelihood of market power in the provision of Internet backbone services.[315] To begin with, @Home and Road Runner lease their backbone facilities from other carriers.[316] AT&T, for its part, has a very small share of the backbone "market."[317] Even if AT&T were to use its own facilities to carry all the traffic associated with @Home, Road Runner, and WorldNet, it would be unable to exercise market power in Internet backbone services because its market share would still be so small. In

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[314] *See* Memorandum Op. and Order, Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control, 13 FCC Rcd. 18025, ¶ 143 n.383 (1998) ("*MCI-WorldCom*")..

[315] *MCI-WorldCom* ¶¶ 22-25.

[316] @Home recently entered into a backbone lease agreement with AT&T and Road Runner has a three year contract with Qwest Communications. *See @Home, AT&T Strike Bandwidth Deal* (January 6, 1999) <www.techweb.com/wire> & *Faster Access Drives Backbone Capacity*, Lightwave (May 1999).

[317] The Directory of Internet Service Providers, 11th ed. (1999) notes that AT&T has approximately 5.1% of the market. MCIWorldCom's share is currently about 33% of the market, and Sprint has about a 9% share.

addition, numerous other firms are building fiber backbone facilities.[318] As a result, it is even less likely that AT&T by itself or in conjunction with @Home and Road Runner would be able to exercise market power by exploiting a lopsided share of Internet traffic.

2. Because the Merged Entity Lacks Market Power, a Forced Access Condition is Unnecessary and Would Introduce Substantial Regulatory Burdens and Technical Difficulties.

Having created a hypothetical market to support their claim that AT&T will exercise market power, Opponents compound their error by insisting that the Commission address this fictitious market failure by imposing a forced access condition. As a review of the proposals demonstrates, no opponent can articulate exactly what is meant by such a condition or what regulatory steps would be entailed. In any event, any forced access requirement is completely unnecessary.

The Merger promises to bring consumers across the country the first tangible benefits they were promised by the Telecommunications Act of 1996. AT&T and MediaOne are new entrants in the extremely competitive market for Internet access services. They have no incentive to undermine their investments in this market by denying consumers the benefits of the broadband revolution. And they have no ability to do so because competitors are already filling the market with new choices and offerings. Consumers have alternatives for Internet access, and they only stand to benefit from widespread investment in broadband facilities.

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[318] Companies ranging from Bell Atlantic to NEXTLINK Communications are building backbone and DSL facilities with the aim of providing improved Internet access and gaining a market foothold. "Price Cuts Raise Stakes in DSL Race," CNET News.com (May 21, 1999) <www.news.com>; NEXTLINK Communications <www.nextlink.net/ra/prod/ proddata.html>.

Moreover, AT&T and MediaOne provide "open access" to the Internet in the only way that is truly meaningful to consumers: free and unfettered access to any content on the Internet.[319] AT&T and MediaOne provide their cable Internet subscribers with an open environment through which they can reach any available content on the World Wide Web. As soon as the customer's computer boots up, network service is available. No log in is required, nor does one have to access @Home's or Road Runner's content to access the Internet. Unlike AOL, moreover, @Home and Road Runner enable consumers to go directly to web pages of their choice without navigating through mandatory welcome screens, advertisements, or annoying pop-up announcements.[320]

AOL, by contrast, uses proprietary "client" software to create a closed system that prevents its subscribers from communicating with customers of other ISPs or accessing their AOL e-mail service from the Web without going through AOL.[321] For example, Mailstart is a service that enables customers of most ISPs, including @Home and Road Runner, to access their email accounts from remote locations. Because AOL's e-mail service uses a proprietary program, AOL customers cannot take advantage of Mailstart.[322] Similarly, AOL has configured its service so that it will not work with web-based instant messaging services, like em9, that

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[319] FCC Counsel Jason Oxman defined open access as "the ability of users to access any Internet service, without compromising quality or price." Diane Merges, *Why Open Access Will Succeed*, Crain Communcations, Inc., (Aug. 23, 1999).

[320] *See* Marshall Decl. ¶¶ 3-5.

[321] According to AOL's Media Metrix of Online Advertising, AOL also "owns the lion's share of traffic on interactive HHs' and monopolizes 46% share of www/online minute." *See* America Online Media Space <http://mediaspace.aol.com/metering/html.> (April 1999).

[322] *See* <www.mailstart.com/faq/asp>.

enable users to see who is online and communicate with them instantly.[323] AOL subscribers must instead use AOL's instant messenger software.

The "Internet experience" provided by AT&T and MediaOne is a more open experience – in ways that matter to consumers interested in the Web's full capabilities – than that offered by AOL. And as AT&T made clear in the AT&T-TCI merger, access to AOL's content or any other Web site requires only a simple mouse click. Forced access regulation would substantially undermine the progress of competition in what has been a wildly successful market. For these reasons, there is no basis for imposing impracticable and burdensome regulatory conditions on the Merger.

a. Forced Access Requirements Would Impose Unnecessary Regulatory and Administrative Burdens on the Commission.

If forced access is imposed as a condition for approval of this Merger, it will require extensive and ongoing government supervision to implement. It is disingenuous to assert that such regulation "will be easy to administer,"[324] and will not require the "imposition of legacy common carrier regulation."[325] Proponents of forced access know that they are drawing the Commission into a regulatory briar patch.

The Canadian experience demonstrates the fallacy of arguments that forced access can be accomplished with only "light touch" regulation. The Canadian Radio-Television and

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[323] *See, e.g.*, <www.em9.com>.

[324] GTE at 61. Indeed, the ten pages of text and twenty-one page supporting affidavit GTE requires to describe the "three simple conditions" that it is asking the Commission to impose belie its claim that forced access would be easy to administer. GTE at 58-67.

[325] AOL at 14.

Telecommunications Commission ("CRTC") adopted its "open access" policy in 1996,[326] and expressly applied it to cable operators last year.[327] But mandating access and making it work are not the same thing. In a September 14, 1999 order, the CRTC acknowledged that there still is no agreement between the CRTC and cable operators on technical issues or the rates, terms, and conditions for access, and rejected the ISPs' request for immediate access to cable facilities.[328]

As the Canadian experience illustrates, the imposition of a forced access requirement would inevitably embroil regulators and industry in ongoing and contentious proceedings to determine and allocate the cost of shared facilities. Price regulation, with its attendant complexities, would ensue. For services as complex as Internet services, price regulation would be a huge undertaking.[329] The tremendous number of disputes and litigation surrounding interconnection and access to unbundled network elements of the local telephone networks confirms that instituting forced access will not be a simple task.

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[326] *See Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services*, Telecom Decision CRTC 96-1 (Jan. 30, 1996) <www.crtc.gc.ca/ENG /NEWS/RELEASES/1996/tel300le.htm>; *see also CRTC Announces New Access Rules for Broadcasting Undertakings*, (April 26, 1996) <www.crtc.gc.ca/ENG/NEWS/RELEASES /1996/r96426ae.htm>.

[327] *See Regulation under the Telecommunications Act of Certain Telecommunications Services Offered by "Broadcast Carriers,"* Telecom Decision CRTC 98-9 (July 9, 1998); *see also CRTC Calls for Comments on Proposed New Broadcasting Distribution Requirements*, (July 2, 1997) <www.crtc.gc.ca/ENG/NEWS/RELEASES/1997/r97072e2.htm>.

[328] Telecom Decision CRTC 99-11 (Sep. 14, 1999) (<www.crtc.gb.ca/eng /telecom/decision/1999/D9911_O.txt>). The CRTC's decision also reaffirms its conclusion that there is only one market for Internet access. *See id.*

[329] *See* Ordover/Willig Decl. ¶¶ 71-72.

Although certain Merger opponents claim to seek access only on "terms and conditions that are equivalent to those offered to affiliated ISPs like Excite@Home and Road Runner,"[330] AT&T does not sell transport capacity to Excite@Home at some fixed rate that could be applied to third party ISPs. Instead, cable subscribers order @Home like they would any other cable service from the operator. The cable operator has complete discretion as to the retail price of the service, and @Home receives 35 percent of the monthly subscriber fees.

The relationship between AT&T and @Home is highly interdependent, and the two parties have negotiated a revenue split that reflects not the cost of transport but rather the investments and expertise that each side brought to the table. For its part, Excite@Home has spent hundreds of millions of dollars to design and build its backbone network and the intelligent caching that speeds transmissions between the public Internet and cable subscribers. Excite@Home and its cable partners together have invested in networks and other infrastructure, support capabilities, and programming in order to develop their cable Internet service. This unique relationship cannot be duplicated by government mandate.[331]

Pricing regulation is an extremely complex process, both procedurally and politically. A new regulatory structure, similar to the structure in place for telephone service, would need to be developed to handle the Internet – a regulatory nightmare that could take years to put in place.[332]

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[330] GTE at 61.

[331] Moreover, any attempt to use the revenue splits between Excite@Home and AT&T would suffer from transfer pricing problems. *See* Declaration of Professors Janusz Ordover and Robert Willig, CS Docket No. 98-178 , ¶ 39 (FCC Nov. 1, 1998)

[332] For example, the rules necessary to promote the core nondiscriminatory provisions of sections 251 and 252 of Communications Act fill 35 pages of text in the Code of Federal Regulations. *See* 47 C.F.R. 51.1 *et seq.* (1998). As Commissioner Powell has explained:

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Further, regulators, no matter how carefully informed, cannot equal the free market in terms of responsiveness or flexibility.[333] While implementation and enforcement of nondiscrimination principles are necessary to foster competition in the local telecommunications services market, such common carrier regulation is completely unnecessary, and actually harmful, if applied in a nascent, competitive marketplace like that for Internet services. As FCC Commissioner Michael Powell has warned, "[m]andating open access to cable could unleash a never-ending regulatory exercise to catch up with change."[334]

b. A Forced Access Requirement Would Diminish AT&T's Incentives to Invest in Broadband Facilities.

The imposition of unbundled access or other specific regulatory conditions on cable Internet services would reduce investment in cable infrastructure and deny or delay the availability of these services. If the market perceives the threat of regulation as a realistic possibility, uncertainty will stall further upgrades and delay the rollout of broadb7and services. If the capital markets doubt government commitment to full competition in broadband

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> [I]t seems inescapable that if we mandate a right to equal access to cable plant, we will quickly find ourselves mired in 'common carrier-like' regulation. Undoubtedly, the minute that an entrant asks to have access to a proprietary cable Internet system, there would be disputes over the price . . . . Calls for collocation rules would soon follow [as well as] disputes over ordering (OSS), disputes over maintenance and trouble ticketing."

Remarks by Michael K. Powell, Commissioner, Federal Communications Commission, before the Federal Communications Bar Association (Chicago chapter), Chicago, Illinois, June 15, 1999 (<http://www.fcc.gov/speeches/Powell/spmkp902.html>).

[333] *See* Ordover/Willig Decl. ¶ 74.

[334] *Id.* FCC Chairman William E. Kennard has articulated the same point: "I don't agree with [AOL's] Steve Case that this is a real easy matter to just craft some regulations that ensure nondiscrimination." *Kennard Claims Jurisdiction Over Cable Unbundling*, Communications Daily (May 20, 1999) (1999 WL 7579492).

infrastructure, a dangerous precedent will be set for anyone who contemplates building their own network. This will significantly raise the cost of capital for new facilities-based competitors, if not kill these projects entirely. Mandating access will also reduce substantially any incentives existing for competitors to build their own facilities alone or in cooperation with others.

Imposing burdensome new requirements on new broadband service providers discourages the necessary and valuable investment in broadband facilities. Burdensome regulation could delay or even halt the deployment of such facilities, and thus postpone the offering of Internet, local telephony, and other new services, by discouraging investment and escalating the cost of the capital used for upgrades. AT&T has raised the funds necessary to acquire TCI and MediaOne and upgrade its cable facilities in the private capital market. These investments are risky and lack a guaranteed return. AT&T's ability and incentive to continue the rollout of broadband facilities and services is closely linked to a stable regulatory environment that promotes investment and rewards risk taking.

GTE claims that forced access will not reduce AT&T's incentives to invest in broadband cable facilities because the returns on the sale of broadband access alone would make it the most remunerative use of channel capacity.[335] In fact, the purchase premium paid by AT&T reflects

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[335] GTE at 65-66. The Rubinfeld-Sidak analysis that Opponents cite for this conclusion is riddled with flaws that makes it unusable. For example, they did not include in their estimates of AT&T's per customer upgrade costs the multi-billion dollar cost of the upgrades necessary to make AT&T's cable system capable of transmitting two-way signals – even though this amount was specifically mentioned in the very document they cite as supporting their estimate. *See* Testimony of Todd A. Jacobs, House Judiciary Committee, Re: H.R. 1685 & H.R. 1686 (June 20, 1999). Likewise, they mindlessly equate AT&T's expected revenues with its expected income (*see* Table 4), but by so doing they ignore the operational costs AT&T will incur in providing Internet services. Finally, while they cite to a textbook by Professors Brealey and Myers as supporting the equation upon which their analysis is based, those authors explain that this equation has no relevance where, as here, the risks of the project are not "carbon copies" of the other businesses in which the company engages and where the assets used in the project do

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the earnings that AT&T hopes to gain through the synergies of offering telephony, Internet access and cable over the MediaOne and AT&T systems combined, and can be recovered only if the combination as a whole is successful. Hence, AT&T can recover its enormous investment in MediaOne only by moving aggressively to deploy, market and support local telephony, high-speed Internet and other new services as planned. The reality is that AT&T can commit to the staggering investments required to acquire and upgrade MediaOne's cable systems for telephony only because the *combined* revenues from the cable and telephone services would be sufficient to allow AT&T to earn a competitive return on its enormous planned investment.

Imposing forced access requirements on AT&T as a condition for approval of this Merger would also weaken the forces driving investment by others in new facilities. AT&T's investment in broadband has served as a powerful competitive spur to the ILECs and other facilities-based providers, "multiplying" AT&T's investment across platforms and services and driving down the price of service. Since AT&T began investing in cable companies like TCI and MediaOne, deployment of all types of advanced broadband services has skyrocketed. Most notably, the ILECs have announced aggressive plans to accelerate their deployment of DSL technology.[336] By slowing AT&T's investments in broadband facilities and services, forced access will deprive consumers of this valuable competitive spur.

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not have infinite life. *See* Brealey & Myers, *Principles of Corporate Finance*, 463, 465, 466 (4th ed. 1991).

[336] *See, e.g.*, Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar, North California Chapter, San Francisco, California (July 20, 1999); *see also* Section I, *supra*.

c. There Are Numerous Technical Difficulties Associated With Any "Mandatory Access" Scheme.

GTE and other Opponents argue that AT&T and MediaOne can make simple technical modifications to their existing cable system architecture in order to accommodate multiple ISPs.[337] As support for their arguments, Ameritech and GTE refer to a limited "friendly" trial that each company has conducted among two or three affiliated and favored ISPs (AOL and its wholly-owned subsidiary CompuServe, which have entered into DSL business alliances with many of the ILECs).[338] Such limited trials, however, are not representative of what is necessary to support real world needs or the scaleable broadband capacity demands required by such an undertaking. While the implementation of forced access for cable modem services might be do-able, it would require a massive commitment of time, energy, and resources to re-engineer cable networks to accommodate the demands of cable's competitors.[339]

While only GTE has actually attempted to formulate a proposal that goes beyond rhetoric,[340] its proposal illustrates either indifference to, or ignorance of, how cable modem service is being provided today by most cable services. GTE's proposal to insert a simple "off-the-shelf" device at the cable network's regional data center reflects a basic misunderstanding of cable network design and operation, and equipment capabilities and standards.[341] As explained

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[337] *See* GTE at 61-62; *see also* Ameritech at 30.

[338] *See* GTE at 58-59, Appendix D, Declaration of Albert Parisian ¶¶ 22-24 ("Parisian Decl."); Ameritech at 30, Exhibit 5, Affidavit of Ali Shadman ¶¶ 27-28 ("Shadman Decl.").

[339] *See generally* Medin Decl.

[340] *See* Parisian Decl. ¶¶ 22-28.

[341] Medin Decl. ¶¶ 5-6.

in an attached declaration by Milo Medin, Senior Vice President and Chief Technical Officer of Excite@Home, GTE's forced access proposal relies on "tunneling," which utilizes networking solutions, either PPP Over Ethernent ("PPOE") or L2TP, neither of which are full IETF standards, which would, in turn, require the development and execution of additional processes and procedures.[342] GTE's proposed forced access solutions also requires the installation of special third party software in the subscriber's PC. GTE's proposal also fails to address how a shared bandwidth architecture can be effectively managed to identify and resolve customer interference, network integration, and network congestion. The proposal is also incompatible with multicasting, such as pay-per-view applications that would be received by multiple subscribers simultaneously.[343]

In effect, GTE's forced access proposal would graft a DSL-like architecture onto the cable plant, thereby attempting to change standard cable modem deployments dramatically to match GTE's telco-oriented business model and process. The delays associated with such a reengineering effort would be significant and contrary to Congressional and Commission policies of encouraging the deployment of broadband alternatives in the marketplace. The cable system architecture simply does not lend itself easily to forced access, which would raise numerous technical problems and slow down full-scale deployment of enriched broadband services. And there is no guarantee that these problems could be addressed with existing technology, or that disputes about the most appropriate manner to solve technical problems would be resolved to the satisfaction of a party demanding access. Regulators would inevitably

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[342] *Id.* ¶¶ 6-8.

[343] *Id.* ¶ 5.

become involved in time-consuming efforts to mediate disputes and dictate the terms of facilities deployment.

More generally, contrary to Opponents' unsupported claims that a forced access requirement would be "easy" or "simple," there are significant technical difficulties and costs that would be associated with the implementation of such an obligation. First, the "shared" nature of the cable plant – in which every customer is capable of receiving every signal transmitted on the network, in contrast to the dedicated pathway for each user on a traditional telephone network – means that one cable customer could interfere with another customer's connection to the Internet.[344] There is currently no ability to allocate bandwidth to a "pool" of unaffiliated ISP customers to prevent this interference and there are few practicable alternatives available to set up an interface with an ISP that requests access.

Second, cable operators do not have the capability to support many of the functions essential to the provision of Internet access services, including customer activation, and IP-based network management and troubleshooting. Changes would be required to network management systems, capacity engineering systems, work order processing, scheduling and billing systems.[345] Third, forced access proponents do not address concerns that a forced access requirement could jeopardize cable system integrity.[346] Fourth, network support cannot easily be managed on system-by-system basis.[347] Indeed, there is no ready model for dividing responsibilities between

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[344] *Id.* ¶¶ 5, 29.

[345] *Id.* ¶ 26.

[346] *Id.* ¶ 28.

[347] *Id.* ¶ 29.

the cable operator or cable Internet service provider and unaffiliated ISPs for the provisioning of and billing for services; customer installation; access by customer service representatives to the cable plant; traffic engineering and management; dispatch and trouble-shooting; network fault isolation; network capacity expansion; and customer software updating and modification.[348]

Forced access proponents are more candid about the difficulties of such a regime when they face the prospect themselves. Incumbent LECs have claimed that "line sharing" – the mandated access to unbundled spectrum on ILEC loop facilities – raises technical problems that would take years to resolve.[349] Incumbent LECs likewise argue that loop spectrum unbundling is unwarranted because such unbundling presents technical difficulties that would require them to expend $5 million or more to modify Operational Systems Support alone – a cost it asserts far outweighs any benefits inherent in spectrum unbundling.[350]

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[348] Moreover, the dynamic nature of enriched broadband services will require constant improvements in and modifications to local network support. Proponents of forced access do not – and cannot – explain how one cable system could change quality of service parameters in the cable modem, enable multicast sessions for pay-per-application streams or configure small office or home office virtual private network parameters.

[349] *See, e.g.*, Comments of Ameritech, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, at 28 (filed Sept. 25, 1998) ("The ability to effectively manage spectrum capability when multiple providers share ... the same physical loop, will require additional standards beyond those currently contemplated. Thus, it is premature to consider mandating that any carrier be required to enter into such an arrangement"). *See also* Reply Comments of U S WEST at 17-22, 25-28 (filed July 22, 1999) (indicating that line sharing would threaten serious degradation of voice service and make it impossible for an ILEC to assure the quality or reliability of voice service provided over a shared loop, raise numerous OSS problems – including, ordering, installation, billing, and maintenance and repair – that would require complicated and costly solutions, and require "significant retooling of systems").

[350] *See id.*, Comments of GTE at 28-29 (filed June 15, 1999); *see also* Reply Comments of U S WEST at 27 (filed July 22, 1999) ("U S WEST estimates that necessary modifications would cost significantly more than the $5 million figure put forth by GTE").

3. Required Forced Access As A Condition For Approval Of The License Transfers Would Be Unlawful.

A few Opponents go so far as to argue that the Communications Act compels the Commission to imposed a forced access requirement on the merged entity. In fact, the Communications Act bars the Commission from imposing common carrier or utility requirements on the provision of cable service, including the provision of advanced cable services like cable Internet services.[351] Cable Internet services are cable services under the amended definition of that term enacted in 1996. And forced access requirements unquestionably subject cable systems to common carrier regulation by reason of providing such services. Hence, any forced access requirement, imposed as a condition for the approval of this Merger or in any other context, would violate section 621(c) of the Communications Act. Such a requirement would also violate section 624(f)'s prohibition on unauthorized imposition of "requirements regarding the provision or content of cable services."

Opponents' calls for regulatory symmetry overlook the vast differences in market power between the cable companies entering the market with no Internet or local telephone customers, and the entrenched monopolist providers of those services; the substantial risk cable companies have taken in developing and deploying broadband facilities, while telephone companies constructed their facilities in a protected regulatory environment; and the First Amendment rights of editorial discretion enjoyed by cable companies. Congress deliberately crafted different

[351] Section 621(c) of the Communications Act, 47 U.S.C. § 541(c), is perfectly clear: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

regulatory schemes for cable and telephony with these differences in mind, and any attempts to disrupt Congress' carefully constructed regulatory balance must be rejected.

a. AT&T@Home and Road Runner Are Cable Services.

AT&T@Home and MediaOne's Road Runner services are unquestionably cable services. "Cable service" is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such . . . other programming service." 47 U.S.C. § 522(6). The term "other programming service" is defined broadly as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). AT&T's and MediaOne's cable Internet services easily fall within this definition. Each service provides subscribers with "information" that is "available to all subscribers generally" and that those subscribers may "select[]" or "use" through "interaction" between the subscribers' and the cable operator's equipment.

Indeed, Congress added the words "or use" to the definition of "cable service" in 1996[352] specifically "to reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*" and thereby to ensure that such interactive information services constituted "cable service."[353] The content-enriched nature of AT&T@Home and MediaOne's Road Runner – which both include a wide range of national and local content – leaves no doubt that they are

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[352] Pub. L. No. 104-104, § 301(a)(1).

[353] H.R. Conf. Rep. 104-458 at 169 (1996) (emphasis added). *See also* 142 Cong. Rec. H1145-06 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell) ("the definition of the term 'cable service' has been expanded to include . . . interactive services").

"cable services" that offer subscribers information selected and created by the programmers and made available generally to all subscribers.

Mindspring asserts that in order to qualify as "other programming," and hence as "cable service," the "information" that the cable provider transmits to subscribers must be information that is "selected by the cable operator and provided *to* the user . . . [as] a passive participant."[354] Mindspring also claims that interactive cable services are "information services" that offer users the capability of acquiring, creating and changing information as "active participant[s]," *id.*, and that "'information services' . . . are not 'cable services.'" But these claims are specifically contradicted by the 1996 Act's legislative history, which explains that "cable service" includes "information *services*" and "enhanced *services*" and not just information that the subscriber passively receives. As the Commission has recognized, Internet access services are "information services."[355] When those services are provided by a cable operator over a cable system, they are cable services.

b. Forced Access Is The Essence Of Common-Carrier Regulation And Therefore Violates Section 621(c).

Section 621(c) of the Communications Act prohibits the regulation of any cable system "as a common carrier or utility by reason of providing any cable service."[356] This provision was enacted to prevent a cable system from being subjected, *inter alia*, "to the traditional common

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[354] Mindspring at 12.

[355] Report to Congress, *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, ¶ 73 (1998) ("*Universal Service Report to Congress*").

[356] 47 U.S.C. § 541(c).

carrier requirement of servicing all customers indifferently upon request."[357] Thus, while Congress adopted certain narrowly defined "must carry" and other specific requirements that set aside cable channels for particular kinds of programming,[358] it barred regulatory bodies from imposing any other access, carriage, or related requirements.

Forced access, which would require AT&T and MediaOne to open their facilities indiscriminately to other providers "by reason of" the provision of the AT&T@Home and MediaOne Road Runner cable services, would violate this prohibition. Courts have uniformly held that a requirement that a cable system carry the programs or services of a specified category of users is a prohibited common carrier regulation. *See, e.g., FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) (holding that Commission rules that required cable operators to set aside four channels for use by particular programmers "plainly impose[d] common-carrier obligations on cable operators").

The Supreme Court reasoned that these earlier forced access requirements were common carrier regulations because "cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis" to "categories of users" specified by the Commission and because "[o]perators are prohibited from determining or influencing the content of access programming." *Id.* at 699, 701-702. That is the essence of common carriage, for it deprives the firm of the right held by a private carrier to "'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Id.* at 701 (citation omitted); *see also California* v. *FCC*,

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[357] H.R. Rep. No. 98-934, at 60 (1984).

[358] *See* 47 U.S.C. § 531 (public, educational, and government); *id.* § 532 (unaffiliated video programming); § 534 (local broadcast television stations); *id.* § 535 (non-commercial educational television).

905 F.2d 1217, 1240 n.32 (9th Cir. 1990). Numerous other courts,[359] as well as Congress[360] and the Commission,[361] have likewise held that requirements that cable systems provide access to third parties constitutes prohibited common carrier regulation.

That principle is controlling here. Forced access would require AT&T and MediaOne to provide nondiscriminatory access to their cable facilities indiscriminately to all ISPs. AT&T and MediaOne would be unable to make individualized decisions of whether and on what terms they would share capacity on their respective cable systems with any ISP. Instead, they would be required to provide transmission facilities to any requesting ISP and to accede to any ISP's request for access. This is the very definition of common carrier regulation forbidden by section 621(c).

MCI and Mindspring argue that cable Internet service is a "local broadband service" that qualifies as both a "telecommunications service" and a "local exchange service," and that

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[359] *See also, e.g., ValueVision Int'l, Inc.* v. *FCC*, 149 F.3d 1204, 1206 (D.C. Cir. 1998) (leased access requirements place the cable operator "in the position of a common carrier"); *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995) (*en banc*) *rev'd on other grounds sub nom. Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996) (requirements for access by public, educational, local governmental, and nonaffiliated commercial users impose "'common-carrier obligations on cable operators'"); *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976).

[360] *See, e.g., Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105-110 (1973) (setting forth legislative history in which Congress recognized that requiring a broadcast station to provide nondiscriminatory access to its facilities by political candidates would render it a common carrier).

[361] *See, e.g., AT&T-TCI* ¶ 29 ("Commenters advocating [access by multichannel video programming distributors to cable capacity] rely on the open access rules applicable to common carriers and seek to expand those requirements beyond traditional common carrier functions. We continue to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation" and deny the request).

AT&T's cable facilities should be subject to Title II regulation, including in particular the obligations of sections 251(a) and (b). While AT&T acknowledges that once AT&T upgrades Media One's facilities and begins providing telephony services to the public over those facilities they will be subject to all applicable Title II requirements (including sections 251(a) and 251(b)), claims that cable Internet service is a telecommunications service, and that MediaOne's facilities are already subject to Title II requirements, are baseless.

As established above, cable Internet services are "cable services," and the legislative history of the Act makes clear that a cable service provided by a cable operator over cable facilities cannot constitute a "telecommunications service." As the Commission has found, deletion of a reference to cable services from the definition of "telecommunications" in an earlier version of the Senate Bill was "'intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent they provide broadcast services or cable services.'"[362]

Even if AT&T's and MediaOne's cable Internet services are not "cable services" subject to Title VI, they would nevertheless not qualify as "telecommunications" services subject to Title II's access and common carriage obligations. As the Commission has concluded, "'telecommunications' and 'information service' are mutually exclusive categories,"[363] and "Internet access services are appropriately classed as information, rather than telecommunications, services," because "Internet access providers do not offer a pure

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[362] *Universal Service Report to Congress* ¶ 44 (quoting 141 Cong. Rec. S7996 (June 8, 1995) (statement of Sen. Pressler)).

[363] *Id.*